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Supreme Court, U.S.
FILED
JAN 11 1993
OFFICE OF THE CLERK

No. 92-1003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. DENNLER, et al.,

Petitioners,

v.

ROBERT S. TRIPPET, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully suggest that the Petition for a Writ of Certiorari[1] be denied for the reasons that (i) the petition was not timely filed, and (ii) the questions presented do not satisfy the standards of Rule 10.

JURISDICTION

The December 11, 1992 Petition for a Writ of Certiorari was untimely filed and thus fails to invoke this Court's jurisdiction. Rule 13 and 28 U.S.C. §2101 require that a

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[1] On December 22, 1992, these Respondents filed a Petition for a Writ of Certiorari, *Cross v. Thorner*, No. 92-1099, requesting review of other issues arising from the same proceedings below.

petition for a writ of certiorari be filed within 90 days after the entry of the judgment for which review is sought. This 90-day time period is mandatory and jurisdictional in a civil case. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Here, the petition was not filed within 90 days after the entry of the judgment which finally resolved the issues raised by the petition, and therefore, it was not timely and failed to invoke the jurisdiction of this Court. *See Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952).

Petitioners seek review of the Tenth Circuit's orders of July 22, 1991, and October 21, 1991 (the "1991 judgments"), which reversed the Section 11 judgments (App. 1a, 51a).[2] However, their petition was not filed until December 11, 1992, which is more than 90 days after the entry of the judgments they seek to have reviewed.

The appellate history of this case is complex. Petitioners obtained judgments in the trial court on both Section 10(b) and Section 11 claims. Following entry of judgments by the trial court, Respondents filed a timely appeal to the Tenth Circuit. The Respondents' appeal resulted in four opinions by the Tenth Circuit. The first two opinions, the 1991 judgments, addressed both the Section 10(b) and Section 11 claims. The final two opinions, rendered on August 24 and October 23, 1992 (the "1992 judgments"), addressed only the Section 10(b) judgments (App. 56a, 98a).

Each of the four opinions of the Tenth Circuit dealt with clearly distinguishable issues. On July 22, 1991, the Tenth Circuit reversed the Section 10(b) judgments and the Section 11 judgments because those claims were filed after

[2] "App." refers to the separately bound appendix filed by Petitioners and "Pet." refers to the petition herein.

the expiration of the applicable statutes of limitation and repose. Petitioners then sought a rehearing regarding the limitation periods applied by the court. On October 21, 1991, the Tenth Circuit clarified its earlier decision with regard to the applicable limitation period for the Section 10(b) claims, but otherwise denied the relief sought.

On December 19, 1991, the Securities Exchange Act of 1934 (the "1934 Act"), was amended by the addition of Section 27A (15 U.S.C. §78aa). This section pertains to dismissed and pending claims under Section 10(b) of the 1934 Act. Section 27A permits reinstatement of claims affected by the decision of this Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ____, 111 S.Ct. 2773, *reh'g denied*, 112 S.Ct. 27 (1991).

On January 6, 1992, the Tenth Circuit, without comment, denied Petitioners' motion under Section 27A to recall the mandate and reinstate their Section 10(b) judgments. Petitioners then petitioned for a writ of certiorari, No. 91-1340, and presented three questions. The first question pertained to the reinstatement of the Section 10(b) judgments pursuant to Section 27A. The remaining two questions pertained to the Section 11 judgments and are identical to the questions in the petition herein. On April 20, 1992, this Court granted certiorari on the Section 27A issue (i.e., the Section 10(b) judgments) and remanded the case to the Tenth Circuit "for further consideration in light of Section 27A . . . ." *Dennler v. Trippet*, 112 S.Ct. 1658 (1992).

Following remand, Petitioners did not raise issues concerning the Section 11 judgments in the supplemental briefing. On August 24, 1992, the Tenth Circuit ruled that Section 27A was constitutional and reinstated Petitioners' Section 10(b) judgments. Referring to the order of August

24, 1992, Petitioners concede that "[t]he Tenth Circuit did not change those aspects of its earlier opinions which held petitioners' Section 11 claims all time-barred" (Pet. 11). These Respondents then petitioned for rehearing regarding the reinstatement of the Section 10(b) judgments, but did not raise issues pertaining to the dismissed Section 11 claims. On October 23, 1992, the Tenth Circuit ruled on various remaining issues, again unrelated to the dismissal of the Section 11 claims, but left the reinstatement of the Section 10(b) judgments undisturbed.

This Court in *Minneapolis-Honeywell* dismissed, for want of jurisdiction, a petition for a writ of certiorari filed within 90 days of a second order of the Seventh Circuit, but more than 90 days after an earlier order. The second order made no substantive change in the earlier order on the issue in question. In dismissing the writ of certiorari, this Court noted:

> Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower Court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Minneapolis-Honeywell, 344 U.S. at 211-12 (footnotes omitted). *See also Dept. of Banking, State of Neb. v. Pink*, 317 U.S. 264, 266-67 (1942); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20, *reh'g denied*, 344 U.S. 910 (1952).

The 1992 judgments of the Tenth Circuit in this case did not change any matter of substance regarding its 1991 judgments dismissing the Section 11 actions, nor was any ambiguity asserted regarding the 1991 dismissals. The 1992 judgments neither disturbed nor revised the legal rights and obligations of the parties relative to the Section 11 claims which the 1991 judgments had settled with finality. Consequently, the time for review of the Tenth Circuit's dismissal of the Section 11 claims began to run no later than the judgment of October 21, 1991, which clarified the July 22, 1991 dismissal of those claims.

This conclusion is not modified by Rule 13. Petitioners' jurisdictional statement relies upon the Tenth Circuit orders of September 10, 1992 and October 23, 1992 in an endeavor to establish the timeliness of their petition. The September 10th order neither addressed nor decided any matter fairly included in the questions presented by the Petition for Writ of Certiorari and, in any event, the petition was not filed within 90 days after September 10, 1992. The order dated October 23, 1992, also did not address or decide any matter fairly included in the questions presented by the Petition for Writ of Certiorari. Rule 13 extends the time to petition this Court for certiorari only when the petition for rehearing referenced by that rule raises a question relating to the issues to be appealed.

By its order of April 20, 1992, this Court directed the Tenth Circuit to reconsider its ruling regarding the Section 10(b) judgments, but did not also order the Tenth Circuit to reconsider its rulings regarding the Section 11 judgments. Petitioners did not petition this Court for rehearing on the Section 11 issues. In the absence of a petition for rehearing or an order of this Court remanding the Section 11 dismissals for reconsideration, neither the April 20, 1992 order of this Court nor the subsequent deci-

sions of the Tenth Circuit on other unrelated issues, preserved Petitioners' right to now raise these identical questions a second time.

The judgments, which resolved with finality the questions Petitioners present in the petition, were entered more than 90 days prior to the filing of the petition. Consequently, Petitioners have not properly invoked the jurisdiction of this Court to issue a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition involves Section 11 and Section 13 of the Securities Act of 1933 (15 U.S.C. §77k, §77m) ("the 1933 Act"), and the Seventh Amendment of the United States Constitution. Respondents invoke 28 U.S.C. §2101 and Supreme Court Rules 10 and 13.

STATEMENT OF THE CASE

This counter statement is necessary to provide an understanding of the issues before this Court.

The Tenth Circuit's 1991 judgments dismissed the Section 11 claims solely upon the issue of the periods of limitation and repose under Section 13 of the 1933 Act (App. 1a, 51a).

Petitioners erroneously assert that the Tenth Circuit's decision pertaining to "inquiry notice" was based solely on the SEC enforcement action (Pet. i, 13-15). Rather, the court based its finding of "inquiry notice," as a matter of law, on the SEC fraud action and other significant facts in the record (App. 26a, 27a, 43a n. 36, 43-46a).

From 1964 through 1972, Home-Stake Production Company ("Home-Stake"), through its Program Operating Companies ("POCs"), offered units of participation in oil and gas drilling programs ("units") which were registered under the 1933 Act. Home-Stake's executives sold units in face-to-face transactions with sophisticated investors in the highest income tax brackets. Prospectuses were provided for the 1964-1972 Program years. In addition, program books, which described the drilling programs and the tax benefits being offered, were presented as a part of the sales literature for the 1964-1970 POCs.

Petitioners state that the Home-Stake "Ponzi scheme forms the basis of petitioners' case" (Pet. 15). There is no finding or evidence in the record that Home-Stake operated a "Ponzi scheme" to defraud investors.[3]

In their footnote 6, Petitioners also raise, for the first time, a claim that the non-class action cases dismissed by the Tenth Circuit in its July 22, 1991 order had not been appealed. To the contrary, the non-class issues were clearly set forth in the Tenth Circuit proceedings, first in Appellants' Joint Brief and again in the petition of Cross for rehearing. This issue has not been raised in any previous petition for writ of certiorari, is not raised by the questions in the current petition, and therefore cannot be fairly included in the questions presented for review.

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[3] During a hearing on January 26, 1990, the trial judge stated: "[W]hether this is a Ponzi scheme or not I did not determine. That's argument of counsel, it is not a factual situation . . . What counsel denominated it to be is something totally outside the record and irrelevant to me."

REASONS FOR DENYING THE WRIT

Objections to the jurisdiction of this Court are included herein at pages 1-6. However, if this Court should determine that its jurisdiction has been properly invoked, then the petition should be denied for the reasons stated below, which were first set forth in Respondents' Brief in Opposition to Petition No. 91-1340, filed March 25, 1992.

I.

THE PETITION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES.

A. There Is No Conflict Between the Decision of the Tenth Circuit and the Decision of Any Other Circuit.

Petitioners' first question is limited to the application of the one-year limitation period of Section 13 to Petitioners' Section 11 claims. Petitioners erroneously contend that the 1991 judgments are in direct conflict with *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979) (Pet. 17-19). Petitioners misconstrue *Robertson* to hold that inquiry notice cannot be triggered by a "wholly distinct fraudulent scheme" (Pet. i, 17-19). To the contrary, the same circuit, in *Arneil v. Ramsey*, 550 F.2d 774, 781 (2d Cir. 1977), held that media coverage, regarding violations of the record keeping provisions of the securities laws, was sufficient to constitute inquiry notice of another independent fraud. *Robertson* does not overrule *Arneil*. *Robertson* discusses fraudulent concealment of a single underlying fraud. *Robertson*, 609 F.2d at 593.[4] Both the

[4] Petitioners argue that only the second SEC fraud suit put them on inquiry notice of these claims. Prior to Petition No. 91-1340,

(Footnote continued on following page)

case at bar and *Arneil* deal with two alleged independent, actionable frauds (Pet. 17). Therefore, *Robertson* is inapposite and not in conflict with the Tenth Circuit decision in this case.

B. Petitioners' First Question Is Based Primarily Upon Factual Issues Fully Considered by the Tenth Circuit.

The Petitioners have drafted their first question very narrowly to imply that the Tenth Circuit resolved the question of "inquiry notice" solely on the effect of the rescission offer. This is not an accurate statement of the basis of the Tenth Circuit's holding.

Factors such as market conditions, legal actions, or adverse or contradictory information are sufficient to place an investor on inquiry notice and to commence the limitation period. *See Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978); *Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975); *Hupp v. Gray*, 500 F.2d 993, 996-97 (7th Cir. 1974); and *Arneil*, 550 F.2d at 781, all cited with approval in *Robertson*, 609 F.2d at 587-89. Furthermore, newspaper articles may be considered in determining inquiry notice. *Kennedy v. Tallant*, 710 F.2d 711, 716 (11th Cir. 1983); *Berry Petroleum*, 518 F.2d at 410. Finally, investor sophistication is a significant factor to be considered with regard to events sufficient to constitute inquiry notice. *Arneil*, 550 F.2d at 781; *Jones v. Ford Motor Co.*, 599 F.2d 394, 399 (10th Cir. 1979).

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[4] *continued*

Petitioners argued that it was a Wall Street Journal article reporting Home-Stake's filing for reorganization which put them on inquiry notice. Obviously, Petitioners have changed the event that they claim triggered inquiry notice for purposes of manufacturing a perceived conflict with *Robertson*, which does not exist.

Here, all of these factual elements supporting inquiry notice were in the record and were considered on appeal. The Tenth Circuit found, as a matter of law (App. 43a), that the investors in the 1970, 1971, and 1972 POCs were placed on inquiry notice more than one year before their Section 11 claims were filed by the following events: (1) on February 11, 1971, the SEC sued Home-Stake for fraud (App. 26a); (2) on February 16, 1971, the SEC fraud action was reported in the Wall Street Journal (App. 27a); (3) on April 30, 1971, the court-ordered rescission offer, which described the SEC fraud action, was mailed to the 1970 participants (App. 27a); (4) the 1971 and 1972 prospectuses described the SEC fraud action (App. 43a n. 36); and (5) the 1970, 1971,[5] and 1972 class representatives, all of whom were sophisticated investors, admitted knowledge of these facts (App. 43a-46a).

The record before the Tenth Circuit demonstrated the Petitioners' constructive knowledge of the alleged fraud from, *inter alia*: (1) the inconsistencies between the prospectuses and the program books regarding income projections; (2) the check stubs and tax summaries which described pro rev as income other than from oil and gas production; and (3) the annual summaries of the status of the development in the prior programs which clearly demonstrated inconsistencies between Home-Stake's projections and actual development. Even if Petitioners were not placed on inquiry notice on the dates of their investments as a result of the inconsistencies between the prospectuses and program books, they were on at least in-

[5] Warren, the 1971 class representative, invested in all the Home-Stake programs from 1964-1972, sold two units back to Home-Stake under his buy-back agreement in 1966 and 1967, and in 1971, received the Rescission Offer, which he rejected.

quiry notice from the date they received the first check stub or tax summary which reported most of the income as being from other than oil and gas production.

The voluntary payments which Petitioners refer to as the "Home-Stake fraud," were designated by Home-Stake as "pro rev" or "program revenue" payments. These payments were not represented by Home-Stake as income from oil and gas production, as Petitioners argue (Pet. 4, 24). Rather, they were represented as income from sources "other" than oil and gas production. Full disclosure of pro rev payments was made by Norman C. Cross, Jr. to the IRS, which approved and allowed pro rev payments as costs in the years that the payments were made. Home-Stake also disclosed the pro rev payments by stating in the 1971 Prospectus filed with the SEC:

> Cash returned to Investors includes funds derived from production and a return upon their capital contributions to the Programs as payment for the use of the contributed funds by Home-Stake . . . In the case of the 1965 to 1969 Programs, inclusive . . . funds derived from the latter sources have constituted virtually all of the net cash returned to Investors.

In December 1970, the SEC issued a formal Order of Investigation of the 1970 POC and, on February 11, 1971, filed a complaint in the district court charging Home-Stake, its officers and directors, and the 1970 POC with violation of the anti-fraud provisions of the federal securities laws. In April 1971, the Final Judgment of Permanent Injunction was entered. Furthermore, on April 30, 1971, the Rescission Offer Prospectus and a copy of the final judgment, describing the SEC fraud charges, were mailed to each of the investors in the 1970 POC. Two hundred seventy-nine investors accepted the rescission offer

and received the return of their investments, plus accrued interest.

The 1971 Prospectus, effective November 3, 1971, and the 1972 Prospectus, effective October 11, 1972, also disclosed details of the SEC fraud charges to the 1971 and 1972 investors. In addition, six lawsuits were filed between June 1971 and January 1973 by various investors alleging that Home-Stake had violated the anti-fraud provisions of the federal securities laws (App. 45a n. 39).

The Tenth Circuit held that these facts collectively constituted " 'great glowering clouds' . . . sufficient to put plaintiffs on notice that something was amiss" and were "enough of a 'storm warning' to start the clock as a matter of law" (App. 43a, 47a). The Tenth Circuit recognized that the three class representatives knew these facts, and noted that each admitted that they "made their own decisions based as much on tax considerations as investment concerns" (App. 44-46a).

Petitioners now ask this Court to find that constructive discovery could not have occurred prior to September, 1973 (Pet. 8). However, their suit for fraud was filed on March 30, 1973, *six months earlier*. Petitioners' argument that constructive discovery could first occur six months after actual discovery is incredible.

Independent of the question of when inquiry notice properly commenced, granting certiorari on the first question presented would also require this Court to consider an additional defect in the Petitioners' Section 11 claims, which arises from post-filing amendments to the class action complaints. The 1971 class claims against Kothe & Eagleton and the first claims by the 1972 class were added by amendment on May 24, 1974, more than one year after the original complaint in this action was filed and, therefore, are time-barred (App. 47a).

The existence of constructive discovery depends upon facts unique to each case. *Robertson*, 609 F.2d at 591. As this Court has recognized, it does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The question of when inquiry notice occurred is a fact-dependent issue peculiar to these Petitioners, and this Court "does [not] sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

C. The Decision of the Tenth Circuit Does Not Violate the Seventh Amendment.

Petitioners state that the Tenth Circuit's holding as to when inquiry notice occurred as a matter of law "flies in the face of common sense . . . and improperly invades the province of the jury" (Pet. 16). If anything "flies in the face of common sense," it is the jury finding that constructive discovery of the fraud could not have occurred prior to September, 1973, which ignores the fact that Petitioners had actual knowledge of the fraud and had already filed their securities fraud claims six months earlier.

Based upon the whole record, the Tenth Circuit correctly concluded that "a single question of law predominates our review" (App. 24a). This Court has long recognized that "if the evidence is uncontradicted and raises only a question of law," there is no violation of the Seventh Amendment right to a jury trial when an appellate court reverses and directs entry of judgment. *Tull v. United States*, 481 U.S. 412, 419 (1987); *Neely v. Martin K. Eby Constr.*, 386 U.S. 317, 321-22, *reh'g denied*, 386 U.S. 1027 (1967).

There is no usurpation of a jury function, nor is there a violation of the Seventh Amendment, where the material facts are undisputed and the court establishes, as a mat-

ter of law, that a statute of limitations bars the action. *Curry v. A. H. Robins Co.*, 775 F.2d 212, 217 (7th Cir. 1985).

The Tenth Circuit was correct in setting aside the jury finding and applying the standards of review set forth in *Black, Sivalls & Bryson v. Keystone Steel Fabrication*, 584 F.2d 946, 951 (10th Cir. 1978), because "both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion." *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943).

Petitioners also state that the Tenth Circuit's opinion conflicts with "well-established principles governing appellate review of jury verdicts in securities law cases," citing *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) (Pet. 19). However, *Mosesian* recognized that a statute of limitations question may be decided as a matter of law "when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Mosesian*, 727 F.2d at 877, citing *Kramas v. Sec. Gas & Oil*, 672 F.2d 766, 770 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982). Petitioners have not and cannot identify a conflict among the circuits. The Ninth Circuit in *Mosesian* cited cases from the Sixth and Seventh Circuits holding that this question may be decided as a matter of law. 727 F.2d at 878. The outcome in *Mosesian* is distinguishable from this case because the Ninth Circuit, in reversing the judgment notwithstanding the verdict, held that the verdict was "reasonable and [was] supported by substantial evidence." 727 F.2d at 879. The facts here do not support a similar conclusion.

The power of any court, trial or appellate, to direct entry of judgment notwithstanding a verdict, without vio-

lating the Seventh Amendment, is well established. *Neely*, 386 U.S. at 322. *See also* 5A J. Moore, J. Lucas, *Moore's Federal Practice*, ¶50.07[1] at pp. 50-61 through 50-64 (2d ed. 1992), and the citations therein. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 360, 363-64, *reh'g denied*, 369 U.S. 882 (1962), and *Robertson*, 609 F.2d at 592, cited by Petitioners, are inapposite since the evidence relevant to the issue was controverted.

In conclusion, Petitioners' first issue does not raise any legal question on the appropriate standard for judgment notwithstanding the verdict, nor does it raise a constitutional question. Instead, this issue is fact-based, i.e., whether a review of the record establishes any material fact questions which would preclude an appellate court from entering judgment. Fact questions are not a basis for granting certiorari. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951).

II.

THE DECISION OF THE TENTH CIRCUIT WITH RESPECT TO SECTION 13 AND EQUITABLE ESTOPPEL IS NOT CONTRARY TO, NOR IN CONFLICT WITH, DECISIONS OF THIS COURT OR OTHER CIRCUITS.

This Court and the various circuits uniformly define equitable estoppel, as it relates to statutes of limitation, to require proof that a plaintiff knew of a cause of action and, because of reliance upon a defendant's subsequent conduct, failed to file the known cause of action in a timely manner. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959); *Aldrich v. McCulloch Properties*, 627 F.2d 1036, 1043 n. 7 (10th Cir. 1980); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988).

Petitioners ignore the distinction between equitable tolling and equitable estoppel to seek review of the Tenth Circuit holding (Pet. 21-22). The distinction is explained in *Cerbone v. Int'l Ladies Garment Workers' Union*, 768 F.2d 45, 49-50 (2d Cir. 1985):

> Unlike equitable tolling, which is involved in cases where the plaintiff is ignorant of his cause of action because of the defendant's fraudulent concealment, equitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing his lawsuit. (citations omitted)

The facts enumerated by Petitioners do not support the application of equitable estoppel. Petitioners have never argued that they knew of their claims but delayed filing suit in reliance upon any conduct or representations of the Respondents. Rather, Petitioners argue that the actions of some Respondents prevented them "from discovering" their claims (Pet. 24), that quarterly payments from other than oil and gas production were made "to conceal the absence of program development and the lack of profitable operations" (Pet. 24), and that the rescission offer prospectus constituted an act of "concealment" (Pet. 26). Thus, Petitioners tacitly acknowledge that the facts of this case do not give rise to equitable estoppel. Petitioners deny knowledge of their claims until six months after the suit was filed, and, therefore, they could not have been fraudulently induced to forego filing a known claim.

Petitioners apparently seek to misconstrue the distinction between equitable tolling and equitable estoppel, recognizing the fact that equitable tolling will not extend the three-year period of repose under Section 13. *Summer v. Land & Leisure*, 664 F.2d 965, 968 (5th Cir. Unit B

1981), *cert. denied sub nom. Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982).

The Tenth Circuit correctly concluded that the 1964-1969 investors "were barred from suit by the three-year statute of repose" since the suit was not filed until March 30, 1973 (App. 39a). This conclusion is compelled by the plain language of Section 13 which states: "[i]n no event shall any such action be brought to enforce a liability created under section 11 . . . more than three years after the security was bona fide offered to the public." The phrase "in no event" means what it says. *See Short v. Belleville Shoe Mfg.*, 908 F.2d 1385, 1391-92 (7th Cir. 1990), *cert. denied*, 501 U.S. ____, 111 S.Ct. 2887 (1991). This Court acknowledged the significance of this language in Section 13 when it construed the three-year provision of Section 9(e) as a "period of repose" not subject to any "tolling principles." *Lampf*, 111 S.Ct. at 2781-82.

A. There Is No Conflict Between the Decision of the Tenth Circuit and the Decisions of Any Other Circuit.

The Tenth Circuit's opinion is not in conflict with *Glus*, *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), *Katz v. Amos Treat & Co.*, 411 F.2d 1046 (2d Cir. 1969), or other cases cited by Petitioners (Pet. 23-24). Those cases each involved statements by defendants that caused the plaintiffs not to file suit, even though plaintiffs knew of their claims before the limitations period elapsed. The courts applied traditional standards of equitable estoppel.

All circuits which have considered the application of equitable estoppel to avoid the three-year limitation period of Section 13 have rejected the principle. *See Short*, 908

F.2d at 1391 (collecting cases). The Tenth Circuit's ruling is consistent with those decisions (App. 32a n. 15, 38-39a). Furthermore, as the Tenth Circuit noted, "*In re Home-Stake* is recognized in the treatises as the 'sole exception' to the three-year absolute bar under section 13" (App. 32a n. 15).

The statement by the Tenth Circuit that equitable estoppel is inapplicable "when the consequence operates to trump a clear outer limit intended by Congress" does not create the conflict claimed by Petitioners. The Tenth Circuit acknowledged that "there may be circumscribed settings in which the doctrine of equitable estoppel might apply to claims governed by Section 13" (App. 37a-38a). Harold S. Bloomenthal, relied upon by the Petitioners (Pet. 22, 23), has commented on the Tenth Circuit's opinion in this particular case, and has noted that the Tenth Circuit's rejection of equitable estoppel is not inappropriate, since

> the issue had been commingled at the trial level with the issue of equitable tolling, and what the jury was asked to decide on the equitable tolling issue was whether the defendants "intended to and did thwart and defeat" the federal courts, the IRS and the SEC, all of which has nothing to do with equitable estoppel.

Harold S. Bloomenthal, SECURITIES LAW HANDBOOK, 1056 (1991-92 ed.).

B. Petitioners' Second Question on the Application of Equitable Estoppel is Uniquely Dependent Upon the Facts of Each Case.

As noted in *Glus*, the application of equitable estoppel is to be determined upon the facts of each case. 359 U.S. at 234. The Tenth Circuit correctly held upon the facts

of this case that Respondents were not equitably estopped from asserting the statute of repose.

A review of the facts and evidence discloses a further defect in Petitioners' contentions. Petitioners' statement of the case imputes to all Respondents the conduct of every other defendant, regardless of when the conduct occurred, and regardless of whose conduct might be considered an act of estoppel. However, neither estoppel nor tolling operate vicariously against persons who are not parties or privy to the transactions from which the estoppel or tolling arose. *Eldred v. Bell Tel. Co.*, 119 U.S. 513 (1886); *Branson v. Wirth*, 84 U.S. (17 Wall.) 32 (1872); *Deery v. Cray*, 72 U.S. (5 Wall.) 795 (1866); *Volk v. D. A. Davidson & Co.*, 816 F.2d 1406 (9th Cir. 1987).

A grant of certiorari by this Court on the second question presented would require this Court to review the facts and evidence unique to the parties to these proceedings to determine if equitable estoppel has been properly rejected by the Tenth Circuit. The factual issues were fully considered by the Tenth Circuit and further review of such factual issues is not an appropriate basis for certiorari. *Pittsburgh*, 340 U.S. at 503; *Johnston*, 268 U.S. at 227.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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